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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 827...

COTTON STATES FERTILIZER COMPANY, C. B. CLAY and W. J. O'SHAUGHNESSEY,

Petitioners,

vs.

S. L. HURT, Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

and

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petition of Cotton States Fertilizer Company, C. B. Clay, and W. J. O'Shaughnessey respectfully shows:

1.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Joel Hurt, Sr., died in 1926. At the time of his death he owned common stock of the Cotton States Fertilizer Company. That stock was not specifically mentioned or bequeathed in his will. After making certain bequests, his will provided that "all of the remainder and residue of my estate, both real and personal and of every nature and

character whatsoever and wherever the same may be situated, I give, bequeath and devise to the following persons, to be divided between them in kind, so far as may be practicable, to-wit: . . . One-sixth (1/6th) thereof to my son, Sherwood Lindsey Hurt . . ." (Respondent here).

This common stock was afterwards sold by the Executors. Notes were taken in part payment therefor. Subsequently these notes were exchanged for preferred stock of the Company, which stood in the name of the Estate at the time of the transactions complained of.

In June of 1944, S. L. Hurt filed a stockholder's derivative action against Cotton States Fertilizer Company and certain of the directors, in the District Court of the United States for the Middle District of Georgia, claiming to be a stockholder in the Company by reason of his "equitable interest" in stock of the Company, such "interest" arising from his status as a residuary legatee under his father's will.

At the time of the institution of the action, there was an outstanding debt due by the estate; the estate had not been wound up; no distribution in kind had been made of the stocks; the Executor had power to sell the stocks for payment of debts of the estate; the legatee had never been in a position to demand or require a distribution of the residuary.

The respondent failed to comply with Rule 23 (b) of the Federal Rules of Civil Procedure in that his complaint failed to aver "that the action is not a collusive one to confer on a Court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction."

Petitioners also urged in the trial Court that the respondent was not a shareholder at the time of the transactions of which he complained, and that his shares had not thereafter devolved upon him by operation of law.

Rule 23 (b) of the Federal Rules of Civil Procedure requires a plaintiff in a stockholder's derivative action to

have been a shareholder at the time of the transaction of which he complains.

The statute law of Georgia [Section 22-711 (6) of the Georgia Code of 1933] requires a petitioner in a stockholder's derivative action to have been a stockholder at the time of the transaction of which he complains.

Both the rule and the statute excuse this requirement if the complainant's shares devolved upon him by operation of law subsequently to the transactions of which he complains. In this case, complainant's shares did not devolve upon him by operation of law, so that the question was: Was he a shareholder or stockholder at the time of the transactions of which he complained?

The trial Court held that the complaint failed to state a claim upon which the relief sought could be granted, and dismissed it, specifically holding:

(a) Plaintiff was not a shareholder in Cotton States Fertilizer Company at the time of the transactions of which he complained, nor did his shares afterwards devolve on him by operation of law;

(b) A residuary legatee under a will, which, among other property, disposes of corporate stocks, where there are outstanding debts and the estate has not been wound up, where no distribution in kind has been made of the stocks, where the Executor has power to sell the stocks for payment of debts of the estate, and where the legatee has never been in a position to demand or require a distribution of the residuary, is not a stockholder in a corporation so as to be in position to bring a derivative action against that corporation under Section 22-711 of the Code of Georgia of 1933, and/or under Rule 23 of the Federal Rules of Civil Procedure.

The Circuit Court of Appeals, on November 3, 1944, rendered a judgment reversing the District Court of the United States for the Middle District of Georgia, holding:

> "An owner of the equitable title, or an equitable interest in the title to shares of stock is not prevented by the Georgia Statute or the Federal Rule from maintaining a suit which seeks to protect stock in which he has such an ownership or interest from impairment or loss."

The record shows without doubt that respondent was not the "owner of the equitable title" to any stock in the Company, so the question is squarely presented:

Is one a "shareholder" in a corporation within the meaning of Federal Rule 23 (b) of Civil Procedure when his only interest in the Company at the time of the institution of his suit is that of residuary legatee under the will of a stockholder which, among other property, disposes of such stock as a part of the residuum and not by specific designation, where, at the time of the institution of the suit there are outstanding debts due by the estate, and the estate has not been wound up, where no distribution in kind has been made of the stocks, where the Executor has power to sell the stocks for payment of the debts of the estate, and where the legatee has never been in a position to demand or require a distribution of the residuary?

The second question presented is:

Was the complaint so defective as to authorize dismissal by the trial Court in that it did not aver that the action was not a collusive one as required by Rule 23 (b) of the Federal Rules of Civil Procedure?

2.

THE BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

Jurisdiction to review the judgment of the Fifth Circuit Court of Appeals is vested in the Supreme Court by Section 240 of the Judicial Code, as amended (U. S. C. A., Title 28, Section 347).

The date of the judgment sought to be reviewed is November 3, 1944.

This application for certiorari is presented January ..., 1945.

3.

THE QUESTION PRESENTED.

1. Is one a "shareholder" in a corporation, authorized to bring a stockholder's derivative action in a Court of the United States within the meaning of Federal Rule of Civil Procedure 23 (b) and within the meaning of the Statute Law of the State of Georgia, if his only interest in the corporation at the time of the institution of his suit and at the time of the transactions complained of was that of residuary legatee under the will of a stockholder, which, among other property, disposes of such stock as a part of the residuum and not by specific designation, where at the time of the institution of the suit, there are outstanding debts due by the estate, and the estate has not been wound up, where no distribution in kind has been made of the stocks, where the Executor has power to sell the stocks of the estate for the payment of debts of the estate, and where the residuary legatee has never been in a position to demand or require a distribution of the residuary?

2. Was the complaint so defective as to authorize dismissal by the trial Court in that it did not aver under oath that the action was not a collusive one, as required by Rule 23 (b) (2) of the Federal Rules of Civil Procedure?

4.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your petitioners respectfully contend that, in reversing the District Court of the United States for the Middle District of Georgia and holding that respondent was a shareholder in Cotton States Fertilizer Company and, so, entitled to maintain a stockholder's derivative action, the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit, the decision of the Circuit Court of Appeals of the Fourth Circuit, in the case of Whitaker et al. v. Whitaker Iron Co. et al., 249 Federal 531 (Certiorari denied by this Court, 248 U. S. 564).

In so far as the decision of the Circuit Court of Appeals attempts to construe the Georgia Statute, it has decided an important question of local law in a way probably in conflict with applicable local decisions.

In deciding that respondent was a shareholder within the meaning of Federal Rule of Civil Procedure 23 (b), the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. Those decisions of this Court which pertain to the question are contrary to the decision of the Circuit Court of Appeals.

In holding that the complaint was not so defective as to authorize dismissal by the trial Court by reason of not averring that the action was not a collusive one, as required by Rule 23 (b) (2) of the Federal Rules of Civil Procedure, the Circuit Court of Appeals has nullified a

portion of a Rule adopted by this Court, and has thus decided an important question of Federal law and procedure which should be settled by this Court.

5.

Petitioners file herewith a certified transcript of the entire record in said cause, including the proceedings in the Circuit Court of Appeals for the Fifth Circuit.

Wherefore, petitioners, within the time allowed by law, file this their petition, and pray that a writ of certiorari may be granted to cause said United States Circuit Court of Appeals for the Fifth Circuit to certify to this Court for its review and determination, petitioners' said cause therein entitled "S. L. Hurt, Appellant, versus Cotton States Fertilizer Company et al., Appellees, Number 11,122."

Respectfully submitted,

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